

## Memorandum 2017-36

**Nonprobate Transfers: Creditor Claims and Family Protections  
(Discussion of Issues)**

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In this study, the Commission<sup>1</sup> is considering the extent to which nonprobate transfers (“NPTs”) should be liable for a decedent’s debts and family protections. This study is based on a background report from the Commission’s former Executive Secretary Nathaniel Sterling entitled *Liability of Nonprobate Transfer for Creditor Claims and Family Protections* (“NPT Report”).<sup>2</sup>

At its June meeting, the Commission decided that this study should focus on two possible statutory changes: enactment of Section 102 of the Uniform Nonprobate Transfers on Death Act and reforms to address the decision in *Kircher v. Kircher*, 189 Cal. App. 4th 1105, 117 Cal. Rptr. 3d 254 (2010), *rev. denied* 2011 Cal. LEXIS 1437.<sup>3</sup>

This memorandum begins the analysis of Section 102.

## BACKGROUND ON UNIFORM ACT

The Uniform Nonprobate Transfers on Death Act (“Uniform Act”) was promulgated by the Uniform Law Commission (“ULC”) in 1989. The Uniform Act has three parts:

- (1) Provisions Relating to Effect of Death
- (2) Multiple-Person Accounts
- (3) TOD [Transfer-on-death] Security Registration

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. The NPT Report is available at <http://www.clrc.ca.gov/pub/BKST/BKST-L4100-NPT-Creditors.pdf>.

3. Minutes (June 2017), p. 6.

Section 102 (which is codified as Section 6-102 of the Uniform Probate Code)<sup>4</sup> is found in Part 1 of the Uniform Act. Parts 2 and 3 have been largely adopted in California, on the Commission’s recommendations.<sup>5</sup>

As discussed in a prior memorandum,<sup>6</sup> California’s Multiple-Person Accounts enactment does not include the uniform provision making such accounts liable for the debts of a deceased account-holder, despite this provision having originally been recommended by the Commission.<sup>7</sup> This creditor liability rule was subsequently dropped from the Uniform Act’s Part on Multiple-Person Accounts, as its effect was subsumed within the general rule of Section 102.<sup>8</sup>

#### OPERATION OF SECTION 102 GENERALLY

For reference, Section 102 is attached to this memorandum as an Exhibit.

This discussion briefly describes the general features of Section 102’s liability rule for NPTs. These aspects of the rule will be discussed and analyzed in detail in a subsequent memorandum.

Under Section 102, an NPT recipient can be liable for “allowed claims against decedent’s probate estate and statutory allowances to the decedent’s spouse and children.”<sup>9</sup> The personal representative can commence a proceeding under

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4. Section 102 of the Act is codified as Section 6-102 of the Uniform Probate Code. Throughout this memorandum, any quoted language is drawn from the Uniform Probate Code unless noted. The Uniform Probate Code and the Uniform Act are available at the following addresses, respectively: [http://www.uniformlaws.org/shared/docs/probate%20code/UPC\\_Final\\_2017mar30.pdf](http://www.uniformlaws.org/shared/docs/probate%20code/UPC_Final_2017mar30.pdf); [http://www.uniformlaws.org/shared/docs/nonprobate%20transfers%20on%20death/unptda\\_final\\_with98amend.pdf](http://www.uniformlaws.org/shared/docs/nonprobate%20transfers%20on%20death/unptda_final_with98amend.pdf).

5. See Prob. Code §§ 5100-5407 (Multiple-Party Accounts), 5500-5512 (TOD Security Registration); see also generally *Recommendation Relating to Non-Probate Transfers*, 15 Cal. L. Revision Comm’n Reports 1605 (1980); *Recommendation Relating to Nonprobate Transfers*, 16 Cal. L. Revision Comm’n Reports 129 (1982); *Uniform TOD Security Registration Act*, 28 Cal. L. Revision Comm’n Reports 577 (1998).

6. See Memorandum 2017-23, pp. 11-12.

7. See *id.* at 11. After the legislation to implement the original recommendation died, the Commission revised its recommendation to omit the provisions relating to the creditors rights. See *Recommendation Relating to Nonprobate Transfers*, 16 Cal. L. Revision Comm’n Reports 129 (1982).

8. See Uniform Nonprobate Transfers on Death Act (1989) § 102 Comments 1 & 2 (“Original UPC included section 6-107 and its 1989 sequel, 6-215. Both were designed to extend probate protections for exemption beneficiaries and unsecured creditors of insolvent estates to values in multiple-name accounts in financial institutions passing outside probate at death. ... New 6-102 replaces 6-215 with coverage designed to extend the principle of 6-215 to transfers at death by revocable trust, TOD security registration agreements and similar death benefits not insulated from decedents’ creditors by other legislation.”) (from 1989 Act commentary).

9. *Id.* § 102(b). Under the Uniform Probate Code, “claims” is defined as including “liabilities of the decedent or protected person, whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of

Section 102 only after receiving a demand from the decedent's creditor or family (depending on whether the liability is sought to be imposed for family protection purposes or satisfaction of creditors).<sup>10</sup>

Section 102 only imposes liability on NPTs to the extent that the decedent's probate estate is inadequate.<sup>11</sup> Unless the decedent directs otherwise by will or other instrument, where the decedent uses a trust as the principal estate planning instrument, that trust would also have to be depleted in order for other NPT recipients to be held liable.<sup>12</sup> Where the decedent's probate or trust estate has been exhausted, the NPT recipients are liable to the decedent's probate estate for the deficiency, in proportion to the values of property received.<sup>13</sup> An NPT recipient's liability "may not exceed the value of nonprobate transfers received or controlled by that transferee."<sup>14</sup>

#### SCOPE OF APPLICATION

Section 102 contains a number of subdivisions that govern different aspects of NPT liability for a claim against the decedent's estate and family protections (including priority rules and procedural rules). This memorandum focuses on the scope of application of Section 102's liability rule. Specifically, which kinds of NPTs are subject to liability under Section 102?

The ULC answers this question in Section 102(a), which defines "nonprobate transfer" for the purposes of the section:

In this section, "nonprobate transfer" means a valid transfer effective at death, other than a transfer of a survivorship interest in a joint tenancy of real estate, by a transferor whose last domicile was in this state to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor's probate estate.

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a conservator, including funeral expenses and expenses of administration." Uniform Probate Code § 1-201(6).

10. Uniform Act § 102(g).

11. See *id.* § 102(b).

12. See *id.* § 102(c); but see *infra* note 41.

13. See Uniform Act § 102(c)(3).

14. *Id.* § 102(b).

The last clause of that definition, addressing whether the transferor could have accessed the property by revocation or withdrawal just prior to death, is particularly important. It underlies much of the analysis that follows.

According to the ULC's commentary, Section 102 is "designed to extend the [probate protections for creditors and families already applicable to multiple-party accounts] to transfers at death by revocable trust, TOD security registration agreements and similar death benefits not insulated from decedent's creditors by other legislation."<sup>15</sup>

Section 102 would impose liability on certain NPTs that are not clearly liable under California law. In other instances, the NPTs subject to liability under Section 102 are already liable to some extent under California law. In yet other instances, Section 102 would exempt certain NPTs from liability. These exemptions are, in some cases, aligned with California law, while, in other cases, are at odds with California law.

Each of these sets of NPTs is discussed, in turn, below.

#### NPTs NOT CURRENTLY LIABLE IN CALIFORNIA, BUT LIABLE UNDER SECTION 102

Section 102 would impose liability on the following NPTs, which are either not liable or not subject to a clear liability rule under California law:

- Personal Property Joint Tenancy
- Pay-on-death ("P.O.D.") Accounts and Totten trusts.
- Transfer-on-death ("TOD") Security Registration
- Retirement accounts

Each of these NPTs is discussed in turn below.

#### **Personal Property Joint Tenancy**

The Commission, at its June meeting, had a robust discussion about whether property passing by right of survivorship should be liable for a decedent's debts. The Commission's discussion, although seemingly centered on concerns about the family home, was not necessarily limited to real property joint tenancy (discussed later in this memorandum<sup>16</sup>), and some of the concerns about

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15. *Id.* § 102 Comment 2 (from 1989 Act); see also *id.* § 102 Comment 1 (from 1989 Act).

16. See discussion of "Real Property Joint Tenancy" *infra*.

imposing liability on joint tenancy property could similarly apply to personal property joint tenancies.

Before discussing the liability rule, it would be helpful to briefly note types of personal property joint tenancies in California. These include:

- Joint account with right of survivorship.<sup>17</sup>
- Vehicle, vessel, or mobilehome registered in joint tenancy form.<sup>18</sup>
- Security account held in joint tenancy with right of survivorship.<sup>19</sup>
- Joint safe deposit box.<sup>20</sup>

#### *Application of Section 102*

Section 102 does not necessarily impose liability on *all* personal property joint tenancies. Instead, the application of Section 102 would depend on the character of the personal property joint tenancy at issue. The ULC commentary explains:

No view is expressed as to whether a survivorship interest in personal or intangible property registered in two or more names as joint tenants with right of survivorship would come within [Section 102(a)]. The outcome might depend on who originated the registration and whether severance by any co-owner acting alone was possible immediately preceding a co-owner's death.<sup>21</sup>

Thus, if a personal property joint tenancy had been revocable by the decedent just prior to death, it would presumably be a “nonprobate transfer” subject to liability under Section 102. On the other hand, if a joint tenancy requires parties to act jointly to access the property,<sup>22</sup> then the NPT transfer of that property

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17. See Prob. Code §§ 5130, 5203(a)(1).

18. See NPT Report, p. 18; see also Health & Safety Code § 18080(a), Veh. Code §§ 4150.5(a), 5600.5(a).

19. See Prob. Code § 5502 (“Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common.”).

20. See NPT Report, p. 14 (“Whether the contents of the box pass by joint tenancy or by another means is determined by the character of the property in the box, not by the manner of rental of the box.”) (citation omitted); but see Civ. Code § 683.1 (“No contract or other arrangement made after the effective date of this section[, which was added in 1949] between any person, firm, or corporation engaged in the business of renting safe-deposit boxes and the renter or renters of a safe-deposit box, shall create a joint tenancy in or otherwise establish ownership in any of the contents of such safe-deposit box. Any such contract or other arrangement purporting so to do shall be to such extent void and of no effect.”).

21. Uniform Act § 102 Comment 5.

22. See Prob. Code § 5401(b) (“The terms of the account or deposit agreement may require the signatures of more than one of the parties to a multiple-party account during their lifetimes or of more than one of the survivors after the death of any one of them on any check, check endorsement, receipt, notice of withdrawal, request for withdrawal, or withdrawal order.”).

seemingly would not be a “nonprobate transfer” for purposes of Section 102 (and would therefore not be liable).

*Application of Section 102 in California*

Traditionally, joint tenancies are necessarily owned by the co-tenants in equal shares.<sup>23</sup> However, California (as well as the Uniform Act) provide that the ownership of funds in a joint account is proportional to each account-holder’s contributions.<sup>24</sup> It is unclear whether other forms of personal property joint tenancies (e.g., vehicle joint tenancy) could similarly be held in unequal shares.

The ULC commentary suggests that, to the extent that personal property joint tenancies are covered by the liability rule, that liability is limited to the portion of the asset that the decedent owned before death. In other words, Section 102 would *not* apply to the portion that had been owned, before the decedent’s death, by the surviving joint tenants.<sup>25</sup> This means that imposing Section 102 on a joint account would require tracing to determine the relative contributions of the different account holders.

That process would be complicated by a 2012 legislative change, which revised Probate Code Section 5301, which governs the ownership of funds in a joint account.<sup>26</sup> The revised law continues to recognize that ownership of funds in a joint account is based on each account-holder’s contributions.<sup>27</sup> The legislation creates a right to recover over-withdrawals from a co-account-holder, but only permits a *living* person to recover such funds.<sup>28</sup> Thus, it appears that a decedent account-holder’s estate could not recover funds that were over-withdrawn by another account-holder, in excess of his or her contributions.

If the Commission decides that Uniform Act Section 102 should apply to joint accounts in California, careful attention will need to be paid to the interaction of Section 102 and Probate Code Section 5301.

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23. See generally Miller & Starr, California Real Estate (4th ed.) §§ 11.21, 11.25.

24. See Prob. Code § 5301(a); Uniform Act § 211(b).

25. See Uniform Act § 102 Comment 6.

26. 2012 Cal. Stat. ch. 235 (AB 1624 (Gatto)). The legislation was based, in part, on a Commission recommendation. See *Ownership of Amounts Withdrawn from Joint Account*, 34 Cal. L. Revision Comm’n Reports 199 (2004).

27. See Prob. Code § 5301(a).

28. See *id.* § 5301(c).

### *Discussion*

The Commission needs to decide whether personal property held in joint tenancy form should be subject to the NPT liability rule in Section 102.

The policy issues relevant to this decision are similar to those that govern real property joint tenancy.

As noted above, there is one additional consideration specific to joint accounts. In 2012, the Legislature decided that a decedent's estate should not be able to make a claim against amounts that were over-withdrawn by surviving account holders. Applying Section 102 to joint accounts could be in tension with that recent legislative policy choice. **Should Section 102 apply to personal property joint tenancies?**

### **P.O.D. Accounts and Totten Trusts**

Section 102 would impose liability on NPTs by P.O.D. account and Totten trusts.<sup>29</sup>

These accounts are similar in that, for each, the owner<sup>30</sup> of the account retains full ownership while living and, upon the account owner's death, the sums remaining in the account belong to the surviving P.O.D. payee or trust beneficiary.<sup>31</sup>

California law currently does not include a liability rule for such transfers. These accounts are both authorized by California's Multiple-Party Accounts Law,<sup>32</sup> which is based on the Uniform Act. As discussed in a prior memorandum, the liability provision governing such accounts was omitted from California's enactment. The omission of the liability rule appears to be related primarily to concerns about imposing liability on joint tenancy bank accounts.<sup>33</sup> The staff does not see a policy reason for exempting NPTs by P.O.D. account or Totten trust from an NPT liability rule.

### **Should Section 102 apply to P.O.D. accounts and Totten trusts?**

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29. See *supra* note 8.

30. There can be multiple owners of a P.O.D. account or Totten trust. See Prob. Code § 5302(b)(1), (c)(1). For ease of explanation, this discussion focuses on an account with a single owner.

31. Again, there can be multiple P.O.D. payees or Totten trust beneficiaries. See *id.* § 5302(b)(2), (c)(2). For ease of explanation, this discussion focuses on an account with a single payee or beneficiary.

32. Prob. Code §§ 5100-5407.

33. See Memorandum 2017-23, pp. 11-12.

## TOD Security Registration

Section 102 would impose liability on NPTs by beneficiary designation on security registration.<sup>34</sup>

California law currently does not include a liability rule for such transfers.<sup>35</sup>

**Should Section 102 apply to TOD security registration?**

## Retirement Accounts

Section 102 appears to impose liability on an NPT of funds in retirement accounts in certain instances.<sup>36</sup> Specifically, if the decedent, while living, made contributions to a retirement account and designated a beneficiary to receive any funds remaining at death, Section 102 would appear to impose liability to the extent that the decedent could have withdrawn those funds just prior to death.<sup>37</sup>

California law currently does not expressly provide for liability of such transfers.<sup>38</sup>

**Should Section 102 apply to funds in retirement accounts?**

### NPTs LIABLE UNDER SECTION 102 AND CALIFORNIA LAW

Certain NPTs that would be liable under Section 102 are currently subject to some degree of liability under California law. Such NPTs include:

- Revocable trusts.
- Revocable transfer on death deeds.
- Transfer on death registration for vehicle, vessel, or mobilehome.
- Gifts in view of impending death.

Each of these NPTs (and its degree of liability under California law) is discussed in turn below.

Given that these NPTs are already liable to some extent under California law, the Commission will need to consider whether to incorporate these NPTs under Section 102's rule or retain their existing liability rules. In general, the staff sees value in addressing all NPTs in a single liability rule to the extent possible. However, it may be significantly disruptive to incorporate certain NPTs with

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34. See *supra* note 8.

35. See NPT Report, p. 17; see also generally Prob. Code §§ 5500-5512.

36. See Uniform Act § 102(a).

37. *Id.*

38. See NPT Report, p. 16; see also *Estate of Davis*, 171 Cal. App. 3d 854 (1985), *rev. denied*.

well-developed liability rules (in particular, revocable trusts) into the Section 102 scheme. This issue will be addressed in detail in a future memorandum.

### **Revocable Trusts**

Section 102 is intended to impose liability on transfers by revocable trust.<sup>39</sup> Under Section 102, where a trust serves as the “principal nonprobate instrument in the decedent’s estate plan,”<sup>40</sup> the NPTs received or controlled by the trust are subject to liability if the probate estate is exhausted. Such a trust must be exhausted before liability will be imposed on other NPTs (including other trusts).<sup>41</sup>

In California, the law governing trusts provides for liability for creditor claims and expenses of probate administration.<sup>42</sup> Specifically, Probate Code Section 19001 provides

Upon the death of a settlor, the property of the deceased settlor that was subject to the power of revocation at the time of the settlor’s death is subject to the claims of creditors of the deceased settlor’s probate estate and to the expenses of administration of the probate estate to the extent that the deceased settlor’s probate estate is inadequate to satisfy those claims and expenses.

This is narrower than the liability imposed by Section 102, which also provides for trust liability for statutory allowances for the decedent’s family and children.<sup>43</sup> California law does *not* impose trust liability for the family protections offered in probate.<sup>44</sup> California law does, however, subject trusts to claims of omitted spouses and children.<sup>45</sup>

Given that the “revocable inter vivos trust is now the principal estate planning device in California,”<sup>46</sup> expanding trust liability to include family protections may be viewed as a significant change.

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39. See *supra* note 8.

40. See Uniform Act § 102(c)(2). The Uniform Act indicates that this status can be shown by the trust’s “designation as devisee of the decedent’s residuary estate or by other facts or circumstances.” *Id.*

41. See *id.* § 102(c); but see *id.* § 102(d), NPT Report, p. 76 (“Although Section 102(c)(2) makes the principal trust primarily liable, Section 102(d) applies a rule of proportionate liability among all trusts.”).

42. See NPT Report, p. 17; see also generally Prob. Code §§ 19000-19403.

43. See Uniform Act § 102(b).

44. See NPT Report, p. 9; see also Prob. Code § 19001.

45. See NPT Report, pp. 148-150; see also Prob. Code §§ 21600-21630.

46. NPT Report, p. 17.

## **Revocable Transfer on Death Deeds**

Section 102 would appear to impose liability on revocable transfer on death deeds.

California's recent legislation authorizing revocable transfer on death deeds includes a provision that imposes liability on the beneficiary for the decedent's unsecured debts.<sup>47</sup> This rule provides, in part:

Each beneficiary is personally liable to the extent provided in Section 5674 for the unsecured debts of the transferor. Any such debt may be enforced against the beneficiary in the same manner as it could have been enforced against the transferor if the transferor had not died. In any action based on the debt, the beneficiary may assert any defense, cross-complaint, or setoff that would have been available to the transferor if the transferor had not died. ...<sup>48</sup>

This section appears to impose liability for creditor claims. It seems unlikely that the beneficiary of a revocable transfer on death deed would be liable for family protections or expenses of probate administration.<sup>49</sup>

## **Transfer on Death Registration for Vehicle, Vessel, or Mobilehome**

Section 102 would appear to impose liability on an NPT by TOD registration of a vehicle, vessel, or mobilehome.<sup>50</sup>

In California, such property is already liable for a decedent's debts under certain circumstances.<sup>51</sup> Specifically, where the probate estate is insufficient to pay the decedent's creditors, the personal representative can recover "a vehicle, undocumented vessel, manufactured home, mobilehome, commercial coach, truck camper, or floating home [transferred] to a designated beneficiary on the decedent's death...."<sup>52</sup>

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47. See generally Prob. Code §§ 5600-5696; 2015 Cal. Stat. ch. 293 (AB 139 (Gatto)).

48. Prob. Code § 5672.

49. Where a probate administration is commenced, the beneficiary is responsible for restoring the value of the property received to the probate. It's not clear whether, once in the probate, the property would be subject to family protections or expenses of administration. See Prob. Code §§ 5674, 5676; but see *id.* § 5676(d) (limiting the personal representative's ability to enforce the liability "to the extent of the beneficiary's liability under Section 5672," while also providing that the personal representative's cost of proceeding with the property recovery will be reimbursed as an extraordinary service).

50. Uniform Act § 102(a); see also Health & Safety Code § 18102.2, Veh. Code §§ 5910.5, 9916.5.

51. See Prob. Code § 9653.

52. *Id.* § 9653(a)(3).

It is less clear the extent to which such an NPT would also be liable for family protections and expenses of administration.<sup>53</sup>

### **Gift in View of Impending Death**

Section 102 would appear to impose liability on a gift made by the decedent in view of impending death.

Under California law, a gift in view of impending death is “one which is made in contemplation, fear, or peril of impending death, whether from illness or other cause, and with intent that it shall be revoked if the giver recovers from the illness or escapes from the peril.”<sup>54</sup>

California law provides that such a gift is revocable by the giver at any time.<sup>55</sup> And, the gift is revoked by operation of law if the giver recovers from the illness or escapes from the peril under which the gift was made.<sup>56</sup>

In addition, California law provides that a gift in view of impending death can be recovered, where the probate estate is insufficient, to satisfy the decedent’s creditors.<sup>57</sup> It is less clear the extent to which a gift in view of impending death could also be liable for family protections and expenses of administration.<sup>58</sup>

### **NPTs NOT LIABLE UNDER SECTION 102**

Section 102 excludes certain NPTs from its liability rule. The excluded NPTs are:

- Real property joint tenancy.
- General power of appointment created by person other than decedent.

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53. Such property can be recovered “[o]n application of a creditor of the decedent or the estate.” *Id.* § 9653(a). Once recovered, the property is sold and “proceeds of the sale shall be applied first to payment of the costs and expenses of suit, including attorney’s fees, and then to payment of the *debts* of the decedent in the same manner as other property in possession of the personal representative.” *Id.* § 9653(c) (emphasis added). “Debts” include an expense of administration and a family allowance in the Probate Code provisions relating to the payment of debts in estate administration. See *id.* § 11401(b), (c). Certain other family protections, such as the probate homestead and exempt property set-aside, are not treated as debts. See, e.g., *id.* §§ 6510, 6520, 11401.

54. *Id.* § 5702(a).

55. *Id.* § 5704 (b)(1).

56. *Id.* § 5704 (a)(1).

57. *Id.* §§ 5705, 9653.

58. See *supra* note 53.

- Life insurance and death benefits.

Each of these NPTs is discussed in turn below.

### **Real Property Joint Tenancy**

Section 102 specifically excludes a “transfer of a survivorship interest in a joint tenancy of real estate” from the definition of “nonprobate transfer.”<sup>59</sup> Thus, a real property joint tenancy is not subject to liability under Section 102.

The ULC commentary explains:

The exclusion of “a survivorship interest in a joint tenancy of real estate” from (a)’s definition of “nonprobate transfer” ignores that some states (e.g., South Dakota) presently enable an insolvent decedent’s creditors to reach the share the decedent could have received prior to death by unilateral severance of the joint tenancy. The law in most other states is to the contrary, meaning that title examiners and others would be affected if the new section were enacted without the exclusion. Moreover, real estate joint tenancies have served for generations to keep the share of a couple’s real estate owned by the first to die out of probate and away from estate creditors. This familiar arrangement needs not be disturbed incident to expanding protections of decedents’ creditors against newly recognized nonprobate transfers at death.<sup>60</sup>

As noted previously,<sup>61</sup> the Commission, at its June meeting, had a robust discussion on whether property transferred by right of survivorship in joint tenancy should be liable for the payment of a deceased joint tenant’s debts. Commissioners generally expressed concern about reversing the current, long-standing rule in California of non-liability and suggested that such a rule could favor creditors at the expense of a surviving spouse and children. The Commission’s interest in studying the Uniform Act seems to have been connected to the Act’s exclusion of real property joint tenancy from the liability rule.

The Uniform Act does not impose liability on real property held in joint tenancy. **Does the Commission want to adopt the Uniform Act’s approach on that point?**

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59. Uniform Act § 102(a).

60. *Id.* § 102 Comment 5.

61. See discussion of “Personal Property Joint Tenancy” *supra*.

## General Power of Appointment Created by Person Other Than Decedent

Broadly speaking, a power of appointment is a power created by a person (the “donor”) that authorizes a person (the “powerholder”) to make a gift of specific property owned or controlled by the donor (the “appointive property”).<sup>62</sup>

A *general* power of appointment is a power that can be exercised in favor of the powerholder, whether or not it can also be exercised in favor of others.<sup>63</sup> Thus, a person who holds a general power of appointment could convey ownership of the appointive property to him or herself. A power that is not general is a *special* power.<sup>64</sup>

This discussion addresses a general power of appointment where the decedent is the powerholder and the donor is a third party (i.e., the decedent-powerholder controls appointive property and could appoint that property to him or herself).

### *Application of Section 102*

The ULC commentary notes that the definition of “nonprobate transfer” does not include “a transfer at death incident to a decedent’s exercise or non-exercise of a presently exercisable general power of appointment created by another person.”<sup>65</sup> In other words, if a decedent was, just prior to death, the powerholder of an exercisable general power of appointment, the appointive property would *not* be liable for the decedent’s debts under Section 102.

In support of that approach, the ULC asserts that “a presently exercisable general power of appointment created by another person is commonly viewed as a provision in the trust creator’s instrument designed to provide flexibility in the estate plan rather than as a gift to the [powerholder].”<sup>66</sup>

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62. Prob. Code § 610(f) (“Power of appointment” means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property.”). A power of appointment does not include a power of attorney. *Id.*

63. Prob. Code § 611(a).

64. See Prob. Code § 611(d). A special power of appointment “generally is one that permits the [powerholder] to appoint to a class that does not include the [powerholder], the [powerholder]’s estate, the [powerholder]’s creditors, or the creditors of the [powerholder]’s estate.” *Id.* § 611 Comment.

65. Uniform Act § 102 Comment 3. The language by which Section 102 achieves this result is not entirely clear.

66. *Id.*

However, the ULC's commentary acknowledges that it took a different approach in the Uniform Probate Code provisions on intentional disinheritance of a surviving spouse.<sup>67</sup> Those provisions treat a presently exercisable general power of appointment as the equivalent of ownership.<sup>68</sup> The ULC justifies that disparity by suggesting that an intentionally disinherited spouse is in need of more protection than a general creditor.<sup>69</sup>

Section 102's treatment of a general power of appointment is also contrary to the subsequently promulgated Uniform Powers of Appointment Act.<sup>70</sup> That issue is discussed further below.

### *California Law*

California's law on powers of appointment was originally enacted in 1969, on the Commission's recommendation.<sup>71</sup>

California law currently imposes liability for a decedent's creditor claims and estate administration expenses on property over which the decedent held a general power of appointment, to the extent that (1) the probate estate is inadequate and (2) the power could be exercised just prior to or at the decedent's death.<sup>72</sup> It is less clear whether such property could be held liable for family protections.<sup>73</sup>

The Commission's original recommendation on powers of appointment discussed this creditor liability rule:

One of the most unsatisfactory aspects of the common law of powers of appointment is the rule governing the rights of creditors

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67. *Id.*

68. *Id.*

69. *Id.*

70. Uniform Powers of Appointment Act (2013), available at [http://www.uniformlaws.org/shared/docs/Powers\\_of\\_Appointment/2013\\_UPAA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Powers_of_Appointment/2013_UPAA_Final.pdf).

71. See *Recommendation and a Study Relating to Powers of Appointment*, 9 Cal. L. Revision Comm'n Reports 301 (1968); see also 1969 Cal. Stat. chs. 113, 155.

72. Prob. Code § 682(b); see also generally NPT Report, pp. 32-33. The NPT Report identifies a notable feature about the liability rule for general powers of appointment:

[O]nce it is determined that the estate is inadequate, the property is liable "to the same extent" as it would be if it were owned by the decedent. Thus the property is considered together with other estate property and liability assigned to it proportionately. That treatment should be contrasted with other liability schemes that make property liable only to the extent the estate is inadequate.

NPT Report, p. 32.

73. It seems unlikely that appointive property could be liable for family protections. See Prob. Code § 682(b) (where powerholder is not the donor, appointive property is subject to liability "to satisfy the claims of creditors of the [powerholder's] estate and the expenses of administration of the [powerholder's] estate"); but see also generally *supra* note 53.

of the [powerholder]. Under the common law doctrine of “equitable assets,” creditors of the [powerholder] can reach the appointive assets only when a general testamentary power of appointment has been exercised in favor of a creditor or volunteer or when an inter vivos exercise of a power results in a fraud on creditors. Property covered by an unexercised power of appointment is not subject to the claims of creditors. These rules apparently constitute present California law.

The common law rule is not logical. Where the power to appoint is both general and presently exercisable, the [powerholder] has the equivalent of full ownership as to the appointive assets. His creditors should be able to reach property that their debtor can appropriate for his own benefit. This is equally true where the property is covered by a general testamentary power which has become presently exercisable by the death of the [powerholder]. In such case, the appointive assets were subject to the complete power of disposition by the debtor-[powerholder] and upon his death should be treated the same as the other assets of the decedent. The rights of creditors should not be dependent upon the exercise of the power. The mere existence of the power should be the essential operative fact.

Accordingly, the Commission recommends that, to the extent that the [powerholder]’s other property is not adequate to satisfy the claims of the creditors, the creditors of the [powerholder] may be permitted to reach property subject to a presently exercisable general power, or subject to a general testamentary power after the [powerholder] has died, to the same extent as if the property were owned by the [powerholder]. The recommended rule is consistent with the rule adopted by modern legislation in other states and the rules that treat such property as owned by the [powerholder] for the purposes of death taxes and bankruptcy.<sup>74</sup>

California’s liability rule for general powers of appointment was recently reaffirmed by the Legislature. In 2016, the Legislature enacted AB 2846,<sup>75</sup> which adopts several provisions of the Uniform Powers of Appointment Act (discussed in more detail below). This legislation, sponsored by the Executive Committee of the Trusts and Estates Section of the State Bar (“TEXCOM”), made minor, nonsubstantive amendments to the liability rule for a general power of appointment.<sup>76</sup>

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74. *Recommendation and a Study Relating to Powers of Appointment*, 9 Cal. L. Revision Comm’n Reports 301, 310 (1968) (citations and footnotes omitted).

75. See 2016 Cal. Stat. ch. 81.

76. Compare Prob. Code § 682, as amended by 2016 Cal. Stat. ch. 81 with Prob. Code § 682, as added by 1992 Cal. Stat. ch. 30.

Thus, long-standing California law, enacted on the Commission's recommendation, is contrary to the treatment of appointive property in Section 102.

#### *Uniform Powers of Appointment Act*

In 2013, the ULC approved the Uniform Powers of Appointment Act.<sup>77</sup> The Act subjects appointive property to liability for creditor claims:

... [A]ppointive property subject to a general power of appointment created by a person other than the powerholder is subject to a claim of a creditor of: (1) the powerholder, to the extent the powerholder's property is insufficient, if the power is presently exercisable; and (2) the powerholder's estate, to the extent the estate is insufficient, subject to the right of a decedent to direct the source from which liabilities are paid.<sup>78</sup>

Thus, this Act permits a deceased powerholder's creditors to impose liability on appointive property. This is contrary to Section 102's treatment of property subject to a general power of appointment.

#### *Discussion*

Long-standing California law and the Uniform Powers of Appointment Act effectively treat the powerholder of a presently exercisable general power of appointment as the de facto owner of the appointive property. Under that view, such property should be subject to liability as an asset of the powerholder.

**The staff recommends that the Commission continue existing California law on this approach, rather than adopting the approach taken in Rule 102.**

#### **Life Insurance and Death Benefits**

Recall that the definition of "nonprobate transfer" only extends to property that could have been recovered by the decedent prior to death and used for his or her own benefit. That serves as a significant limitation on the liability of life insurance and other kinds of similar death benefits (i.e., benefits that pay to a surviving beneficiary, but were not fully accessible to the decedent while living).<sup>79</sup>

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77. See *supra* note 70.

78. Uniform Powers of Appointment Act § 502(a).

79. Other death benefits could include the following: retirement death benefits, workers' compensation death benefits, and social security death benefits. See NPT Report, pp. 16, 17, 18; see also 42 U.S.C. § 407; Code Civ. Proc. §§ 704.110(d), 704.115(d), 704.160.

For example, the ULC commentary indicates that Section 102 would not apply to a life insurance death benefit “except to the extent of any cash surrender value generated by premiums paid by the insured that the insured could have obtained immediately before death.”<sup>80</sup>

The ULC commentary also acknowledges that the liability of life insurance benefits may be limited by a state law exemption on the enforcement of judgments.<sup>81</sup>

In the absence of an applicable exemption, Section 102 would limit the liability of a person who receives life insurance or other death benefits, to the extent that those assets could not have been reached by the decedent just prior to death.

**Does the Commission wish to adopt the limiting principle described above, with respect to life insurance and other forms of death benefits?** The application of the exemptions from California’s enforcement of judgments law<sup>82</sup> to life insurance and death benefits (i.e., whether these NPTs would be wholly protected from a decedent’s creditor claims) will be discussed in a future memorandum.

#### OBLIGATIONS FOR WHICH NPTs ARE LIABLE

As discussed above, Section 102 and California’s NPT liability rules do not necessarily impose liability for the same kinds of obligations.

#### **Section 102 Approach**

Generally, Section 102 imposes liability on NPTs for a broad set of obligations. Section 102 imposes liability “for allowed claims against the decedent’s probate estate and statutory allowances to the decedent’s spouse and children.”<sup>83</sup>

Under the Uniform Probate Code, claims include:

... liabilities of the decedent or protected person, whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the

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80. See Uniform Act § 102 Comment 2.

81. *Id.*

82. See generally Code Civ. Proc. §§ 703.010-704.995.

83. Uniform Act § 102(b).

appointment of a conservator, including funeral expenses and expenses of administration.<sup>84</sup>

The Uniform Probate Code does not clearly identify “statutory allowances.” At a minimum, this would seem to include the items addressed in Part 4 of the Uniform Probate Code (“Exempt Property and Allowances”), which include:

- Homestead Allowance<sup>85</sup>
- Exempt Property<sup>86</sup>
- Family Allowance<sup>87</sup>

Conceptually, these allowances are similar to certain family protections offered in a California probate.<sup>88</sup>

### California Law, Generally

Currently, under California law, the NPTs subject to liability are universally subject to liability for creditor claims.<sup>89</sup> For certain NPTs, the liability expressly extends to expenses of administration, as well.<sup>90</sup>

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84. Uniform Probate Code § 1-201(6).

85. *Id.* § 2-402. Under the Uniform Probate Code, the homestead allowance entitles the spouse or minor and dependent children to a specified sum of money. See *id.* California’s probate homestead is different in that a court, in its discretion, imposes a temporary (but potentially long-term) burden on a particular piece of property that serves as the family dwelling. See NPT Report, pp. 143-144; Prob. Code §§ 6520-6528.

86. Uniform Probate Code § 2-403. Under the Uniform Probate Code, the surviving spouse or children are entitled to “a value, not exceeding \$15,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects.” See *id.* California’s exempt property set-aside is a discretionary award of “all or any part of the property of the decedent exempt from enforcement of a money judgment, other than the family dwelling” in favor of the surviving spouse or minor children of the decedent. Prob. Code § 6510; see also NPT Report, pp. 142-143.

87. Uniform Probate Code § 2-404. Under the Uniform Probate Code, the surviving spouse and minor children are entitled to a “reasonable allowance ... for their maintenance during the period of administration.” *Id.* California’s law similarly entitles the spouse and minor children, as well as dependent adult children, to a “reasonable family allowance ... as is necessary for their maintenance according to their circumstances during administration of the estate.” Prob. Code § 6540(a); see also NPT Report, pp. 145-146.

88. See *supra* notes 85, 86, and 87; but see NPT Report, p. 74 (citing Transcript, Unif. Prob. Code § 6-102, Proceedings of NCCUSL (1st Sess., Fri. Morn., July 24, 1998)) (“Statutory allowances apparently are not intended to include such non-monetary items as a probate homestead or other exempt property.”); see also generally NPT Report, pp. 137-151.

89. See discussions of “NPTs Liable under Section 102 and California Law” and “General Power of Appointment Created by Person Other Than Decedent” *supra*.

90. Under California law, revocable trusts and general powers of appointment, are subject to liability for expenses of administration. Prob. Code §§ 682(b), 19001(a). It is less clear, but appears that gifts in view of impending death and transfer on death registered vehicles and vessels would also be liable for expenses of administration. See *supra* note 53; see also Prob. Code § 9653(c).

None of California's existing NPT liability rules, however, expressly imposes liability for family protections. The NPT Report notes:

The family protections evolved to shield a decedent's dependents from the decedent's improvidence (creditor claims) and from the decedent's intentional or inadvertent neglect of the decedent's support obligation (claims of other beneficiaries). Most of the family protections require a probate proceeding for implementation. ...

Otherwise, if there is no probate proceeding there is no mechanism to implement the protection. Nonprobate transfers were not intentionally excluded from the purview of the family protections. They were simply developed at a time when probate rather than nonprobate transfer was the primary mechanism for passing property at death.<sup>91</sup>

The NPT Report recommends that the "family protection statutes should be extended to nonprobate transfers."<sup>92</sup>

## **Conclusion**

Section 102 makes NPTs liable to the decedent's probate estate.<sup>93</sup> Pulling NPTs into the probate estate would provide a practical way to impose the family protections available in California law.

In addition, given that Section 102's scheme for imposing liability on NPTs requires a probate proceeding,<sup>94</sup> it seems reasonable to subject the NPT to liability for expenses of administration.

Going forward, unless the Commission directs otherwise, the staff will analyze the implementation of a broad liability rule in California that would impose liability on NPTs for creditor claims, family protections, and expenses of administration.

## NEXT STEPS

Future memoranda will address the following issues.

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91. NPT Report, p. 139.

92. *Id.* at 156. The NPT Report also notes "[t]his has already been done for the small estate set-aside and to a limited extent for omitted spouse and child protections." *Id.*

93. Uniform Act § 102(b).

94. See *id.* § 102 Comment 1.

## **Obligations for Which NPTs are Liable**

As described above, Section 102 imposes liability on NPTs for a broad range of obligations. To the extent that the Commission is comfortable with the categories of obligations covered by Section 102 (e.g., creditor claims, family protections, and expenses of administration), a future memorandum will analyze the obligations for which NPTs might be liable in California (i.e., the obligations in California law that properly fall within in those categories).

## **Exemptions**

The Uniform Act includes a clause intended to clarify that Section 102 “does not supersede existing legislation protecting death benefits in life insurance, retirement plans or IRAs from claims by creditors.”<sup>95</sup> This clause caveats Section 102’s liability rule with “[e]xcept as otherwise provided by statute.”<sup>96</sup>

California law provides a number of exemptions from the enforcement of money judgments.<sup>97</sup> A future memorandum will discuss the possible application of California’s exemptions to NPTs otherwise liable under Section 102.

## **Community Property**

Section 102 does not specifically address community property. This is perhaps unsurprising, as community property is not recognized in most states.

The staff’s initial impression is that Section 102 may be in tension with some aspects of California’s community property laws. That concern will be addressed in a future memorandum.

## **Imposition of Liability under Section 102**

This memorandum briefly highlights some of the operational elements of Section 102’s liability scheme. As indicated, Section 102 makes NPTs liable to the decedent’s probate estate and the personal representative in probate enforces this liability. The imposition of liability under Section 102 will be discussed in more detail in a subsequent memorandum.

## **Implementation**

Later in this study, the Commission will also need to decide how to address California’s existing liability rules and schemes applicable to specific NPTs (e.g.,

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95. *Id.* § 102 Comment 2.

96. *Id.* § 102(b).

97. See generally Code Civ. Proc. §§ 703.010-704.995.

revocable trusts). These implementation questions will be addressed in a memorandum later in this study.

Respectfully submitted,

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Staff Counsel

**UNIFORM PROBATE CODE SECTION 6-102**  
**(WITH ULC COMMENTARY)**

**SECTION 6-102. LIABILITY OF NONPROBATE TRANSFEREES FOR CREDITOR CLAIMS AND STATUTORY ALLOWANCES.**

(a) In this section, “nonprobate transfer” means a valid transfer effective at death, other than a transfer of a survivorship interest in a joint tenancy of real estate, by a transferor whose last domicile was in this state to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor’s probate estate.

(b) Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against decedent’s probate estate and statutory allowances to the decedent’s spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.

(c) Nonprobate transferees are liable for the insufficiency described in subsection (b) in the following order of priority:

(1) a transferee designated in the decedent’s will or any other governing instrument, as provided in the instrument;

(2) the trustee of a trust serving as the principal nonprobate instrument in the decedent’s estate plan as shown by its designation as devisee of the decedent’s residuary estate or by other facts or circumstances, to the extent of the value of the nonprobate transfer received or controlled;

(3) other nonprobate transferees, in proportion to the values received.

(d) Unless otherwise provided by the trust instrument, interests of beneficiaries in all trusts incurring liabilities under this section abate as necessary to satisfy the liability, as if all of the trust instruments were a single will and the interests were devised under it.

(e) A provision made in one instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument. If a provision in one instrument conflicts with a provision in another, the later one prevails.

(f) Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this state, whether or not the transferee is located in this state.

(g) A proceeding under this section may not be commenced unless the personal representative of the decedent’s estate has received a written demand for the proceeding from the surviving spouse or a child, to the extent that statutory allowances are affected, or a creditor. If the personal representative declines or fails to commence a proceeding after demand, a person making demand may commence the proceeding in the name of the decedent’s estate, at the expense of the person making the demand and not of the estate. A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.

(h) A proceeding under this section must be commenced within one year after the decedent's death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within 60 days after final allowance of the claim.

(i) Unless a written notice asserting that a decedent's probate estate is nonexistent or insufficient to pay allowed claims and statutory allowances has been received from the decedent's personal representative, the following rules apply:

(1) Payment or delivery of assets by a financial institution, registrar, or other obligor, to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered.

(2) A trustee receiving or controlling a nonprobate transfer is released from liability under this section with respect to any assets distributed to the trust's beneficiaries. Each beneficiary to the extent of the distribution received becomes liable for the amount of the trustee's liability attributable to assets received by the beneficiary.

### **Comment**

1. Added to the Code in 1998, this section clarifies that the recipients of nonprobate transfers can be required to contribute to pay allowed claims and statutory allowances to the extent the probate estate is inadequate. The maximum liability for a single nonprobate transferee is the value of the transfer. Values are determined under subsection (b) as of the time when the benefits are "received or controlled by that transferee." This would be the date of the decedent's death for nonprobate transfers made by means of a revocable trust, and date of receipt for other nonprobate transfers. Two or more transferees are severally liable for the portion of the liability based on the value of the transfers received by each.

This section replaces Section 6-107 of the original Code, and its 1989 sequel, Section 6-215. To the extent a deceased party's probate estate was insufficient, these sections made a deceased party's interest in multiple-name accounts in financial institutions passing outside probate liable for the deceased party's statutory allowances and creditor claims. Assets passing at death by revocable trust or TOD asset registration agreements were not covered by these sections. Also, Section 6-201(b) of the original Code and its 1989 sequel, Section 6-101(b), provided merely that the section did not limit any other rights that might exist. Neither section created any rights.

If there are no probate assets, a creditor or other person seeking to use this Section 6-102 would first need to secure appointment of a personal representative to invoke Code procedures for establishing a creditor's claim as "allowed." The use of probate proceedings as a prerequisite to gaining rights for creditors against nonprobate transferees has been a feature of UPC Article VI since originally approved in 1969. It works well in practice. The Article III procedures for opening estates, satisfying probate exemptions, and presenting claims are very efficient.

2. Section 6-102 replaces Section 6-215 with coverage designed to extend the principle of Section 6-215 to transfers at death by revocable trust, TOD security registration agreements and similar death benefits not insulated from decedents' creditors or statutory allowances by other legislation. The initial clause of subsection (b), "Except as otherwise provided by statute," is designed to prevent a conflict with and to clarify that

this section does not supersede existing legislation protecting death benefits in life insurance, retirement plans or IRAs from claims by creditors.

If a state's insurance laws do not exempt or protect a particular insurance death benefit, the insured's creditors would not be able to establish a "nonprobate transfer" under subsection (a) except to the extent of any cash surrender value generated by premiums paid by the insured that the insured could have obtained immediately before death. Note, also, that subsection (i)(1) would protect a life insurance company that paid a death benefit before receiving written notice from the decedent's personal representative.

3. The definition of "nonprobate transfer" in subsection (a) includes revocable transfers by a decedent; it does not include a transfer at death incident to a decedent's exercise or nonexercise of a presently exercisable general power of appointment created by another person. The drafters decided against including such powers even though presently exercisable general powers of appointment are subject to the Code's augmented estate provisions dealing with protection of a surviving spouse from disinheritance. Spousal protection against disinheritance by the other spouse supports the institution of marriage; creditors are better able to fend for themselves than financially disadvantaged surviving spouses. In addition, a presently exercisable general power of appointment created by another person is commonly viewed as a provision in the trust creator's instrument designed to provide flexibility in the estate plan rather than as a gift to the donee.

4. The required ability to revoke or otherwise prevent a nonprobate transfer at death that is vital to application of subsection (a) is described as a "power," a word intended by the drafters to signify legal authority rather than capacity or practical ability. This corresponds to the definition in Section 2-201(6).

5. The exclusion of "a survivorship interest in a joint tenancy of real estate" from the definition of "nonprobate transfer" in subsection (a) is contrary to the law of some states (e.g., South Dakota) that allow an insolvent decedent's creditors to reach the share the decedent could have received prior to death by unilateral severance of the joint tenancy. The law in most other states is to the contrary. By excluding real estate joint tenancies, stability of title and ease of title examination is preserved. Moreover, real estate joint tenancies have served for generations to keep the share of a couple's real estate owned by the first to die out of probate and away from estate creditors. This familiar arrangement need not be disturbed incident to expanding the ability of decedents' creditors to reach newly recognized nonprobate transfers at death.

No view is expressed as to whether a survivorship interest in personal or intangible property registered in two or more names as joint tenants with right of survivorship would come within Section 6-102(a). The outcome might depend on who originated the registration and whether severance by any co-owner acting alone was possible immediately preceding a coowner's death.

6. A feature of replaced Section 6-215 that was clarified by 1991 technical amendment protected a survivor beneficiary of a joint account from liability to the probate estate of a deceased co-depositor for funds in the account owned by the survivor prior to decedent's death. Subsection (a) continues this protection by use of the language "valid transfer effective at death...by a transferor...[who] had power, acting alone, to prevent the transfer by revocation or withdrawal and instead use the property for the

benefit of the transferor....” Section 6-211 and related sections of the Code make it clear that parties to a joint and survivor account separately own values in the account in proportion to net contributions. Hence, a surviving joint account depositor who had contributed to the balance on deposit prior to the death of the other party is subject to the remedies described in this section only to the extent of new account values gained through survival of the decedent.

7. Transferees of nonprobate transfers subject to the possible liability described in subsection (b) include trustees of revocable trusts to the extent assets transferred to the trust before death were subject to the decedent’s sole power to revoke. Such assets would be valued as of the date of death. While the trustee of an irrevocable trust, or of a trust that may be revoked only by the settlor and another person would ordinarily not be subject to this section, this section could apply if the trust is named as a beneficiary of a nonprobate transfer, such as of securities registered in TOD form. Under subsection (b), such a transfer would involve a possibility of trust liability based on the value of the TOD transfer as of the time of its receipt. Liability under this section incurred by a trustee is a trust liability for which the trustee does not incur personal liability except as provided by Section 3-808(b).

8. Trusts and non-trust recipients of nonprobate transfers incur liability in the order prescribed in subsection (c). Note that either a revocable or an irrevocable trust might be designated devisee of a pour-over provision that would make the trust the “principal non-probate instrument in the decedent’s estate plan” and, consequently, make it liable under subsection (c)(2) ahead of other nonprobate transferees to the extent of values acquired by a transfer at death as described in subsection (a). Note, too, that nothing would pass to the receptacle trust by the pour-over devise if all probate estate assets are used to discharge statutory allowances and claims. However, the fact that the trust was designated to receive a pour-over devise signals that the trust probably includes the equivalent of a residuary clause measuring benefits by available assets and signaling probable intention of the settlor that residuary benefits should abate to pay the settlor’s debts prior to other trust gifts.

9. The abatement order among classes of beneficiaries of trusts specified by subsection (d) applies to all trusts subject to liability to the extent of nonprobate transfers received or administered whether or not the trust instrument is the principal nonprobate instrument in the decedent’s estate plan. The drafters decided against a cross-reference to the Code’s abatement provision, Section 3-902, in part because that section deals with intestate and partially intestate estates as well as estates governed by wills. Note, too, that trusts for successive beneficiaries also will be governed by income and principal accounting rules that will serve to resolve some abatement issues.

10. Subsection (e) recognizes that a number of separate instruments and transactions, executed at different times and with or without internal references linking them to other documents, may constitute the paperwork describing succession to a decedent’s assets by probate and nonprobate methods. By authorizing control of abatement among gifts made by various transfers at death by the last executed instrument, the subsection permits a simple, last-minute override of earlier directions concerning a decedent’s wishes regarding priorities among successors. Thus, a will or trust amendment can correct or avoid liquidity and abatement problems discovered prior to death. The expression “blockbuster will” was coined by estate planners in the mid 70’s to refer to interest in legislation

enabling a later will to override death benefits by any nonprobate transfer device. This subsection meets some of the goals of advocates of this legislation.

11. Subsection (f) builds on the principle employed in the Code's augmented estate provisions (UPC Sections 2-201 through 2-214) in relation to nonprobate transfers made to persons in other states, possibly by transactions governed by laws of other states. The underlying principle is that the law of a decedent's last domicile should be controlling as to rules of public policy that override the decedent's power to devise the estate to anyone the decedent chooses. The principle is implemented by subjecting donee recipients of the decedent to liability under the decedent's domiciliary law, with the belief that judgments recovered in that state following appropriate due process notice to defendants in other states will be accorded full faith and credit by courts in other states should collection proceedings be necessary.

12. The first and third sentences of subsection (g) are identical to sentences from former Section 6-215, which this section replaces. The second sentence is new. It reflects sensitivity for the dilemma confronting a probate fiduciary who, acting as required of a fiduciary, concludes that the costs and risks associated with a possible recovery from a nonprobate transferee outweigh the probable advantages to the estate and its claimants. A creditor whose claim has been allowed but remains unsatisfied and whose demand for a proceeding has been turned down by the estate fiduciary may proceed at personal risk in efforts to enforce the estate claim against the nonprobate beneficiary. This is so because the last two sentences of subsection (g) shift the risk of unrecoverable costs from the decedent's estate to the claimant who undertakes collection efforts on behalf of the decedent's estate. Any recovery of costs should be used to reimburse the claimant who bore the risk of loss for the proceeding. A personal representative tempted to decline a demand for a proceeding should note that the "good faith" standard of this subsection must be determined in light of the fiduciary responsibility imposed by Section 3-703.

13. Subsection (h) meshes with time limits in the Code's sections governing allowance and disallowance of claims. See Sections 3-804 and 3-806.

14. Subsection (i)(1) is designed to protect issuers of TOD security registrations who make payments or delivery to designated death beneficiaries before receiving notice from the decedent's probate estate of a probable insolvency. These entities are not "transferees" subject to liability under subsection (b), but they might incur legal or other costs if the beneficiaries request payment in spite of warning notices from estate fiduciaries.

Subsection (i)(2) is designed to enable trustees handling nonprobate transfers to distribute trust assets in accordance with trust terms if a warning of probable estate insolvency has not been received. Beneficiaries receiving distributions from a trustee take subject to personal liability in the amount and priority of the trustee based on the value distributed.